

LLC (collectively, the “Petitioners”) object to the Receiver’s recommendation, urging this Court to allow the Petitioners to submit their post-auction credit bid for the Property. The Court’s decision follows.

I

Facts and Travel

Respondent Robert Day, LLC (Day) is a Rhode Island limited liability company with its principal place of business located at the Property. (Pet. for the Appointment of a Receiver ¶¶ 1-2.) Petitioner RSS UBSCM2012-C1 – RI RD, LLC (RSS) is a Rhode Island limited liability company and assignee of Deutsche Bank Trust Company Americas, as Trustee for the Registered Holders of UBS Commercial Mortgage Trust 2012-C1, Commercial Mortgage Pass-Through Certificates, Series 2012-C1 with respect to a promissory note (the “Note”) and mortgage executed by Day concerning the Property (the “Mortgage”). *Id.* ¶ 3. RSS is a creditor of Day with a claim in the amount of approximately \$19,238,884 pursuant to the Note and Mortgage. *Id.* Petitioner Rialto Capital Advisors LLC (Rialto) is a special servicer on behalf of RSS with respect to the Note, Mortgage, and certain loan agreements executed by Day. *Id.* ¶ 4. This matter arose as a result of Day’s failure to make any scheduled payments since May 2020, placing the Note in default. *Id.* ¶ 5.²

By way of background, on October 6, 2020, the Petitioners filed a Petition for the Appointment of a Receiver based on Day’s above-mentioned payment default, to which Day objected contesting the appointment of a receiver. *Id.* at 3. On October 30, 2020, this Court entered an Order granting the Petition for Appointment of a Receiver and initially appointed the Receiver

² The Property is a twelve-story mixed use commercial property with office and retail space. (Receiver’s Am. Pet. to Engage Property Manager (Nov. 5, 2020) ¶ 2; Pet. to Engage Real Estate Agent (Nov. 23, 2020) ¶ 2.)

as Temporary Receiver. (Order Appointing Temporary Receiver (Oct. 30, 2020) (Stern, J.)) Following the Receiver's appointment, the Receiver sought an order from this Court approving the Receiver's engagement of Peregrine Property Management, LLC to manage the Property. (Receiver's Am. Pet. to Engage Property Manager 1.) Following a hearing, this Court entered an Order approving the Receiver's engagement of Peregrine Property Management, LLC as the Receiver's manager of the Property.³ (Order Granting Receiver's Am. Pet. to Engage Property Manager (Nov. 23, 2020) (Stern, J.))

The Receiver also filed a Petition to Engage Real Estate Agent, seeking court approval of the Receiver's engagement of Thomas Sweeney of Sweeney Real Estate & Appraisal (the "Broker") as the Receiver's real estate agent to lease units and sell the Property. (Pet. to Engage Real Estate Agent 1.) Day, however, objected to this Petition arguing that "a broker with greater experience in dealing with assets at this price point would be better situated to market the units for lease and to market and sell the real estate for the highest and/or best offer." (Resp't's Obj. to Pet'rs' Pet. to Engage Real Estate Agent (Nov. 27, 2020) 1-2.) Despite Day's objection, the Court granted the Receiver's Petition to engage the Broker,⁴ and also entered an Order converting the Receiver from Temporary to Permanent Receiver of the Property with the power to "sell [the Property] at public auction[.]"⁵ (Am. Order Appointing Permanent Receiver (Dec. 18, 2020))

³ On November 23, 2020, the Receiver filed a similar Petition to Engage Financial Consultant seeking court approval of the Receiver's engagement of Piccerelli, Gilstein & Company, LLC as the financial consultant to the Receiver in connection with the Property. (Pet. to Engage Financial Consultant (Nov. 23, 2020) 1.) The Court also granted this Petition. (Order Granting Receiver's Pet. to Engage Financial Consultant (Dec. 7, 2020) (Stern, J.))

⁴ The Court granted the Receiver's Petition to Engage Real Estate Agent on January 11, 2021. *See* Order Granting Receiver's Pet. to Engage Real Estate Agent (Jan. 11, 2021) (Stern, J.).

⁵ With respect to the marketing efforts undertaken in connection with the public auction of the Property, Attorney Giovanni La Terra Bellina, Esquire, Counsel to the Receiver for Day and the Property, filed an Affidavit of Notice where he attached the four publications that were published in *The Providence Journal* on November 28, 2021, December 1, 2021, December 5,

(Stern, J.) ¶ 7.) Following entry of these Orders, the Petitioners made no mention of any intention to submit a credit bid for the Property.

Thereafter, on December 21, 2020, the Petitioners filed a Motion to Approve Secured Claim of Petitioners. (Mot. to Approve Secured Claim of Petitioners (Dec. 21, 2020).) The Court granted this Motion, without objection, designating the Petitioners as holding a first priority mortgage and security interest in the Property. (Order Granting Mot. to Approve Secured Claim (Jan. 19, 2021) (Stern, J.)) There was, again, no mention by Petitioners of a desire to submit a credit bid for the Property following entry of this Order.⁶

Approximately one year later, on November 18, 2021, the Receiver filed a number of Petitions in connection with the sale of the Property. *See* Docket (PC-2020-06964). Among these petitions was a Petition to Approve Break-up Fee, in which the Receiver explained the marketing efforts made by the Broker which resulted in receiving multiple offers to purchase the Property.⁷ (Pet. to Approve Break-up Fee (Nov. 18, 2021) ¶ 4.) In this Petition, the Receiver explained that after requesting the highest and best offers, the Receiver began negotiating the terms of a purchase and sales agreement with Manzo Freeman Development, LLC (Manzo). *Id.* Manzo, however,

2021, and December 9, 2021, respectively. (Aff. of Notice 1.) Attorney La Terra Bellina also discussed these “extensive marketing” efforts at the hearing the morning of the auction. (Morning Session 25:15-24.)

⁶ While there is nothing in our receivership statute requiring a secured creditor to file a motion to authorize a credit bid, our State’s practice has been for the secured creditor to file a motion prior to being permitted to submit a credit bid. *See LaBonte v. New England Development R.I., LLC*, 93 A.3d 537, 538 (R.I. 2014) (secured creditor filed Motion to Approve Secured Claim, *Authorize Credit Bid*, and Approve Release of Funds).

⁷ In addition to the Petition to Approve Break-up Fee, the Receiver also filed a Petition to Sell Property Free and Clear of Liens and Encumbrances. (Pet. to Sell Property Free and Clear of Liens and Encumbrances (Pet. to Sell) (Nov. 18, 2021) 1.) Specifically, the Receiver through this Petition sought an order from this Court authorizing a sale of the Property pursuant to a Real Estate and General Asset Purchase and Sale Agreement, free and clear of all interests, claims, liens, and encumbrances. (Pet. to Sell Ex. A.)

eventually withdrew its offer to purchase and, after consultation with the representatives of Rialto, the Receiver directed the Broker to re-market the Property. *Id.* By August 2021, the Receiver obtained three new offers to purchase the Property. *Id.* ¶ 6. According to the Receiver, the “highest and best offer was submitted by GFI Partners, LLC” (GFI), or its nominee Dorrance Street Property Owner, LLC (the “Bidder”), in the amount of \$5,150,000. *Id.* The Receiver and the Bidder negotiated the terms of the purchase and sales agreement, which was executed on November 1, 2021. *Id.* However, as a condition for entering into a purchase and sales agreement and becoming the “stalking horse,” the Bidder requested a “break-up fee” in the amount of \$100,000 for its professional fees and expenses related to due diligence in preparation for the sale of the Property. *Id.* ¶ 7. The Petitioners did not submit a competing stalking horse bid, object to the Receiver’s recommended stalking horse bid and break-up fee, or indicate any intention to submit a credit bid for the Property until filing their Motion to Authorize Credit Bid Pursuant to Court-Approved Secured Claim the evening before the auction. (Mot. to Authorize Credit Bid (Dec. 17, 2021) 1.)⁸

Importantly, the Receiver also submitted a Petition to Approve Bid Procedures in connection with the public auction of the Property. (Receiver’s Pet. to Approve Bid Procedures (Nov. 18, 2021).) The Court granted the Receiver’s Petition to Approve Bid Procedures with no objection from the Petitioners. (Order Granting Receiver’s Pet. to Approve Bid Procedures (Dec. 1, 2021) (Stern, J.)) Pursuant to this Order, the auction for the Property was scheduled to take place on December 17, 2021 at 11:00 a.m. before this Court via WebEx. *Id.* ¶ 2. The Order set out specific bidding procedures that were required to be satisfied in order to qualify as a bidder at the

⁸ The Court granted the Petition to Approve Break-up Fees on December 17, 2021. (Order Granting Receiver’s Pet. to Approve Break-up Fees (Dec. 17, 2021) (Stern, J.)) The timing of Petitioners’ Motion to Authorize Credit Bid is of particular significance and is further discussed *infra*.

auction. *Id.* ¶ 3. As part of these bidding procedures, any person or entity seeking to qualify to bid was required to deliver a written offer to purchase the Property to the Receiver by 5:00 p.m. on December 10, 2021. *Id.* The signed offer to purchase the Property was required to be at least \$5,250,000, with a cash deposit of not less than \$100,000. *Id.* ¶ (3)(ii). Unless a bidder received written authorization from the Receiver to the contrary, all bids must be made on the Real Estate and General Asset Purchase and Sales Agreement and may not be modified by the bidder. *Id.* ¶ 4. All offers were subject to higher and/or better offers and the final decision on the successful bidder would be made by this Court after a recommendation from the Receiver as to which offer to purchase the Receiver believed was in the best interest of the creditors. *Id.* ¶¶ 6, 8.

Interestingly, on December 16, 2021 at 5:54 p.m., the eve of the auction and six days after expiration of the qualifying bid deadline, the Petitioners filed a Motion to Authorize Credit Bid Pursuant to Court-Approved Secured Claim. (Mot. to Authorize Credit Bid 1.) Not only did the Petitioners file this Motion six days *after* the December 10, 2021 deadline, but the Petitioners did not execute a purchase and sales agreement with the Receiver, submit a written offer of at least \$5,250,000, or submit a cash deposit of at least \$100,000 in accordance with the court-approved bidding procedures. *See id.*; Order Granting Receiver’s Pet. to Approve Bid Procedures. This Court denied the Petitioners’ Motion for their “completely inequitable” conduct in failing entirely to adhere to the court-approved bidding procedures and then attempting to submit a bid at the eleventh hour. *See* Docket (PC-2020-06964).⁹

Following conclusion of the December 17, 2021 auction, the Receiver recommended to this Court an offer of \$6,550,000 for the Property, which the Receiver believes is in the best interest

⁹ This Court will further explain its rationale for denying Petitioners’ Motion to Authorize Credit Bid in the instant Decision.

of the creditors and the receivership estate. (Afternoon Session Hr’g Tr. 2:10-16, Dec. 17, 2021.)¹⁰ The Petitioners, however, urge this Court not to accept this recommendation from the Receiver as the highest and best offer and to allow the Petitioners to submit a post-auction credit bid for the Property in the amount of \$9,500,000. *Id.* at 13:14-320. This Court’s Decision follows.

II

Standard of Review

When the Court sits in equity, the trial justice has great discretion to “determine the appropriateness of, and to formulate, equitable relief,” guided by “basic principles of equity and justice.” *Normandin v. Gauthier*, No. 03-6211, 2004 WL 5540481 (R.I. Super. Oct. 29, 2004) (quoting *Ruggieri v. City of East Providence*, 593 A.2d 55, 57 (R.I. 1991)); *see also City of East Providence v. Rhode Island Hospital Trust National Bank*, 505 A.2d 1143, 1146 (R.I. 1986). It is well settled that our Supreme Court will not disturb the decision of a trial justice sitting in equity unless it is shown that he or she was clearly wrong or failed to do substantial justice between the parties or misconceived or overlooked material evidence. *Connor v. Sullivan*, 826 A.2d 953, 960 (R.I. 2003) (“This Court will not disturb the findings of a trial justice sitting in equity unless he or she clearly was wrong or misconceived or overlooked material evidence.”); *Clark v. Bowler*, 623 A.2d 27, 30 (R.I. 1993); *Berberian v. Martin*, 100 R.I. 227, 229, 214 A.2d 189, 191 (1965); *Waterman v. Waterman*, 93 R.I. 344, 351, 175 A.2d 291, 295 (1961).

As our Supreme Court has not addressed issues concerning credit bidding, late bidding, or the trial justice’s determination of a receiver’s recommendation of a highest and best offer, this

¹⁰ Two separate transcripts were produced by the Court Reporter as a result of the Court taking a recess during the auction. These two transcripts are not consecutively paginated and, thus, the Court will refer to the Morning Session Transcript as (Morning Session Hr’g Tr.) and the Afternoon Session as (Afternoon Session Hr’g Tr.). To be clear, both Court Sessions occurred on December 17, 2021. (Morning Session Hr’g Tr. 1; Afternoon Session Hr’g Tr. 1.)

Court will look to the Bankruptcy Code and to decisions by the federal courts for guidance. *Reynolds v. E & C Associates*, 693 A.2d 278, 281 (R.I. 1997) (citing *Leonard Levin Co. v. Star Jewelry Co.*, 54 R.I. 465, 468, 175 A. 651, 653 (1934)); see *Brook v. The Education Partnership, Inc.*, No. PB 08-4185, 2010 WL 1456787, at *3 (R.I. Super. Apr. 8, 2010) (looking to the Bankruptcy Code and Federal Court interpretations for guidance on evaluating a receiver’s recommendations); *St. Joseph Health Services of Rhode Island, Inc., v. St. Josephs Health Services of Rhode Island Retirement Plan*, No. PC-2017-3856, 2018 WL 5792151, at *3, 7 (R.I. Super. Oct. 29, 2018) (relying on the Bankruptcy Code and federal case law in the absence of relevant state receivership law); see also *Giroux v. Purington Building Systems, Inc.*, 670 A.2d 1227, 1230 (R.I. 1996); *Cambio v. G-7 Corp.*, No. 96-0705, 1998 WL 1472896, at *3-6 (R.I. Super. Feb. 11, 1998) (holding that while Rhode Island insolvency laws have been preempted by federal bankruptcy laws, the Rhode Island Receivership Statute, codified in G.L. 1956 §§ 7.1.1-90 *et seq.*, has not been preempted by the Bankruptcy Code).

“Being that Rhode Island’s receivership statute represents ‘merely a codification of equitable principles,’ this Court must use such equitable principles to fashion fair and equitable rules of law where state statutes remain silent and binding precedent does not exist.” *Patel v. Shivai Nehal Realty LLC*, No. KB-2012-0301, 2012 WL 5380060, at *2 (R.I. Super. Oct. 26, 2012) (quoting *Hill v. M.S. Alper & Son, Inc.*, 106 R.I. 38, 55, 256 A.2d 10, 19 (1969)).

III

Analysis

A

Credit Bid Motion

As mentioned above, on December 16, 2021, the evening before the auction, the Petitioners filed a Motion to Authorize Credit Bid to allow Petitioners to credit bid in the full amount of their secured claim in the sale of the Property. (Mot. to Authorize Credit Bid 1.) In support of their Motion, Petitioners relied on the Order entered by this Court approving the Petitioners' Proof of Claim where the Court determined that Petitioners held a first priority mortgage and security interest in the real and personal property specified in the loan documents, including but not limited to the Property. *Id.* ¶¶ 2-3. Petitioners argued that “no party [would] be prejudiced by . . . granting [the Petitioners] this authority” because the Petitioners obtained court-approval of their secured claim almost one year ago, the amount and approval of which was known to all parties, and because the Petitioners' credit bid is expressly authorized by Sections 7.1(a) and (d) of the Mortgage with respect to the Property. *Id.* ¶ 4.

Credit bidding permits the secured creditor to bid for its collateral using the “debt it is owed to offset the purchase price, which ensures that, if the bidding at the sale is less than the amount of the claim the collateral secures, the secured creditor can, if it chooses, bid up the price to as high as the amount of its claim.” *In re: Aeropostale, Inc.*, 555 B.R. 369, 414 (Bankr. S.D.N.Y. 2016) (quoting *In re Free Lance-Star Publishing Co. of Fredericksburg, VA*, 512 B.R. 798, 805 (Bankr. E.D. Va. 2014) (further internal quotations omitted)). Credit bidding “therefore provides a safeguard for secured creditors, by insuring against the undervaluation of their

collateral at an asset sale.” *Id.*; see *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 642 n.2 (2012).

While any secured creditor may bid at a sale of property in which they hold a secured lien, “the right to credit bid is not absolute.” *In re: Aeropostale, Inc.*, 555 B.R. at 414 (citing *In re Free Lance-Star*, 512 B.R. at 808); see also 11 U.S.C. § 363(k); *In re Fisker Automotive Holdings, Inc.*, 510 B.R. 55, 59 (Bankr. D. Del. 2014). Section 363(k) of the Bankruptcy Code provides that a party may credit bid unless the court, for cause, orders otherwise. § 363(k). Because the term “cause” is not defined by the Bankruptcy Code, however, courts are left to determine whether cause exists on a case-by-case basis. *In re: Aeropostale, Inc.*, 555 B.R. at 414-15; see also *In re Olde Prairie Block Owner, LLC*, 464 B.R. 337, 348 (Bankr. N.D. Ill. 2011). Thus, the “decision of whether to deny credit bidding based on cause is within the discretion of the court.” *In re: Aeropostale, Inc.*, 555 B.R. at 415 (citing *In re Olde Prairie Block Owner, LLC*, 464 B.R. at 348). “Courts will deny a secured creditor’s right to credit bid due to inequitable conduct.” *Id.*; see, e.g., *In re Free Lance-Star Publishing*, 512 B.R. at 804-06. Inequitable conduct is often, but not limited to, conduct that “directly impacts the estate or the bidding process.” *In re: Aeropostale, Inc.*, 555 B.R. at 415.

The Petitioners’ primary argument in support of their Motion to Authorize Credit Bid is that “no party will be prejudiced by the Court granting them this authority.” (Mot. to Authorize Credit Bid ¶ 4.) The Petitioners expanded on this argument at the December 17, 2021 hearing, arguing that “[c]redit bids . . . are common, and we [do not] believe there would be any prejudice to any party in this action since the credit bid position in this case was well known and well understood by all.” (Morning Session Hr’g Tr. 9:4-7.) The Petitioners also contended that because the other bidders at the auction are “sophisticated parties and could well understand that the

creditor may seek authority to credit bid at auction and the creditor has a legitimate interest in protecting its secured claim[.]" there is no prejudice to these parties were this Court to allow the Petitioners to credit bid. *Id.* at 9:8-11.

As the Court explained on the record, this is an instance where the Court would expect more from a sophisticated lender than to be before the Court the morning of the auction seeking authorization to submit a credit bid. *Id.* at 21:21-24. Moreover, this is a unique case in that the Court issued a bid procedure order which clearly detailed the steps necessary to qualify as a bidder at the auction for the Property. *Id.* at 22:21-25; *see also* Order Granting Receiver's Pet. to Approve Bid Procedures. The Court is particularly troubled that "[n]ot only did the bank not ask to credit bid before now," but came before this Court seeking authorization to credit bid despite admittedly not following the Court's bidding procedures in any way. (Morning Session Hr'g Tr. 23:3-9.) It is quite evident from the Facts and Travel detailed above that the Petitioners have had their hand in this receivership matter since its inception and in fact were the movants who filed the initial Petition for the Appointment of a Receiver. *See* Pet. for Appointment of a Receiver 3. Counsel for Petitioners even admitted that "the Receiver suggested that Rialto consider filing some kind of precautionary request to be able to submit a credit bid earlier in this process[]" and that "in retrospect, sure, we could have filed [a motion to submit credit bid] at an earlier point in time[.]" (Afternoon Session Hr'g Tr. 16:10-16.) The reality is that at no time prior to the eve of the auction did the Petitioners indicate *any intention* to submit a credit bid. This is so even though the Court approved, *without objection by the Petitioners*, clear bidding procedures, which the Petitioners wholly failed to satisfy. Thus, it is clear that the "[Petitioners] messed up." *Id.* at 23:16-17.

Now, while it is true that the Court has the authority to amend its own order, "that's where the prejudice comes in." *Id.* at 23:10-12. That is, the other qualified bidders relied on this Court's

bidding procedures to get a seat at the table. The Petitioners are asking this Court, in effect, to speculate and assume that the other parties would have done the same due diligence and presented the same offers if they knew on the morning of the auction that the Petitioners would come in and credit bid. *Id.* at 23:24-25, 24:1-3. In fact, the stalking horse bidder and other qualified bidders had every reason to believe that the Petitioners were satisfied with the sale price even if the stalking horse bid was the highest and best offer for the Property. The Petitioners cannot now come “hat in hand” the morning of the auction and ask the Court for a continuance to allow them to submit a credit bid by suggesting that the same bidders would have submitted bids in the same amounts had they known two or three weeks before that the Petitioners would put in a credit bid. *Id.* at 23:17-23. “As far as this Court is concerned, that is completely inequitable” conduct that directly impacts the bidding process. *Id.* at 23:23-24; *see also In re: Aeropostale, Inc.*, 555 B.R. at 415.

Although receivership practice is not as constrained as the bankruptcy practice under the Bankruptcy Code, it is based on the ability of both the debtors and creditors to follow a process specified by the Court and to be able to respect and honor the Court’s Order. (Morning Session Hr’g Tr. 24:4-9.) The Petitioners here wholly failed to do that. *Id.* Consequently, because the Petitioners failed to adhere to the Court’s bidding procedures and to protect the integrity of the bidding process in this receivership, the Court confirms its denial of the Petitioners’ motion to submit a credit bid.

B

Highest and Best Offer

The Court will now turn to whether the offer recommended by the Receiver is the highest and best offer for the Property. As mentioned above, because “the Rhode Island Supreme Court has yet to articulate the standard of review that a court must apply when evaluating a receiver’s

recommendations, the Court will look to the Bankruptcy Code and Federal Court interpretations thereof for guidance.” *Brook*, 2010 WL 1456787, at *3 (citing *Reynolds*, 693 A.2d at 281). “In Rhode Island, it has been noted that ‘the Legislature has granted broad powers of control to enable the court in a receivership proceeding to conserve the interests of all parties involved.’” *Patel*, 2012 WL 5380060, at * 3 (quoting *Francis v. Buttonwood Realty Co.*, 765 A.2d 437, 443 (R.I. 2001)); *see also Bogosian v. Woloohojian*, 901 F. Supp. 68, 72 (D.R.I. 1995), *appeal dismissed, vacated without opinion*, 86 F.3d 1146 (1st Cir. 1996).

1

Receiver’s Recommendation

Following conclusion of the auction, the Receiver presented to the Court a bid in the amount of \$6,550,000, which also included “extremely substantial and material changes to the terms of the [purchase and sales] agreement.” (Afternoon Session Hr’g Tr. 2:13-16.) Among other changes, the \$100,000 deposit would go from refundable to nonrefundable. *Id.* at 3:2-3.¹¹

After presenting this offer and explaining the agreed changes to the purchase and sales agreement, the Receiver concluded by stating that he “strongly recommend[ed] this agreement” and that it “improved substantially” in price and also transformed the agreement from one from which the buyer could “eas[ily] walk-away” to one that is a “substantially noncontingent agreement.” *Id.* at 4:13-19. The Receiver, therefore, “strongly recommend[ed] th[is] offer to the Court” as the highest and best offer received during the auction for the Property. *Id.* at 4:18-19; *see also id.* at 2:10-12.

¹¹ Other notable changes to the purchase and sales agreement included striking, in full, the due diligence requirements and rules contained in Section 6 of the agreement as well as providing the seller the right to retain the deposit in the event the buyer defaults in the performance of buyer’s obligations under the agreement. (Afternoon Session Hr’g Tr. 3:4-6, 3:21-25, 4:1.)

However, the Petitioners, as a last ditch effort, objected to the Receiver’s recommended highest and best offer for the Property, urging this Court to allow the Petitioners to submit a post-auction credit bid for the Property. *See id.* at 8:25, 9:1-4. Specifically, the Petitioners “request the Court to determine that the highest and best offer proposed by the Receiver to be approved by the Court . . . not be approved . . . and that the Court allow Rialto to make an alternative proposal” *Id.*

In support of its objection to the Receiver’s recommendation, the Petitioners argue that “[w]e live in strange times today” and that the “COVID pandemic has dramatically affected the real estate market and in particular the market in Providence.” *Id.* at 9:7-10. Because of this, the Petitioners argue that “it is very hard to say whether or not the highest and best price proposed by the Receiver today in six months or three months would be considered the highest and best price.” *Id.* at 9:15-18. The Petitioners also argue that the fact that multiple bidders during this receivership walked away further illustrates that these are “strange times[.]” *Id.* at 11:7-11. Additionally, the Petitioners contend that the appraisal of the Property is “more than double what has been identified as the highest and best bid at this hearing[.]” *id.* at 10:2-11, and that the Petitioners are the “only party to this proceeding who is going to be materially adversely affected by the Court’s approval of the proposed highest and best bid” *Id.* at 12:4-8.

“The ‘business judgment’ test applies to determine whether a sale under § 363(b) should be approved.” *In re Allen*, 607 Fed. App’x 840, 843 (10th Cir. 2015); *see, e.g., In re Lionel*, 722 F.2d 1063 (2d Cir. 1983); *In re Mountain States Rosen, LLC*, 619 B.R. 750, 753 (Bankr. D. Wyo. 2020) (noting that, in determining whether to approve a proposed sale under section 363, courts generally apply standards that essentially represent a business judgment test); *In re Castre, Inc.*, 312 B.R. 426, 428 (Bankr. D. Colo. 2004). Under this business judgment standard, “the [Receiver]

seeking approval of the sale must show sound business reasons for the sale.” *In re Allen*, 607 Fed. App’x at 843.

In determining whether the Receiver exercised proper business judgment, the Court must consider evidence of any improper or bad motive, whether the proffered price is fair and the negotiations or bidding occurred at arm’s length, and whether the Receiver followed adequate procedures, including proper exposure to the market and accurate and reasonable notice to all parties in interest. *In re Mountain States Rosen, LLC*, 619 B.R. at 753 (citing *In re Castre, Inc.*, 312 B.R. at 428). Put another way, the Receiver’s business judgment must be evaluated as to the propriety of the stalking horse bid, the preparation for and conduct of the auction, and the highest and best bid received. *In re Castre, Inc.*, 312 B.R. at 428; *see also In re Gulf States Steel Inc. of Alabama*, 285 B.R. 497 (Bankr. N.D. Ala. 2002).

As an initial matter, it is imperative to bear in mind the context in which the Receiver made his recommendation to the Court as to the highest and best offer for the Property. That is, the Receiver made his recommendation to this Court based on what was properly before him during the auction and the offers made therein. The Receiver’s recommendation as to the \$6,550,000 offer being the highest and best was based on the bids made by the qualified bidders present at the auction. Thus, in considering whether the Receiver exercised proper business judgment in recommending the \$6,550,000 offer to the Court, the Court is mindful that this offer was the highest offer received at the conclusion of the auction.

Here, it is clear that the Receiver exercised proper business judgment in selecting and recommending the offer of \$6,550,000 to the Court. There is absolutely no evidence of improper or bad motive on the part of the Receiver and the Court is satisfied that bidding occurred at arm’s length as there is no evidence whatsoever to the contrary. *See In re Mountain States Rosen, LLC*,

619 B.R. at 753. The Court is equally satisfied that the Receiver followed adequate procedures in marketing the Property as well as evaluating the propriety of the stalking horse bid. This is evident from the fact that the Receiver engaged the Broker as mentioned above to assist with getting “as broad as possible” a market for the sale of the Property. *Id.* at 6:10-23.

Furthermore, once the Receiver was “in total control” of the sale of the Property, he “had the realtors begin a campaign of advertising, reaching out with the direct mailers, electronic contacts,” and even some “old fashioned telephone calls” to spread the word about the Property. *Id.* at 7:7-12. Because of these efforts by the Receiver, at one point approximately five interested parties viewed the Property, and ultimately, the Receiver began negotiating with one of these interested parties. *Id.* at 7:12-419. While no agreement was reached with this interested party, the Receiver made it a point to keep the Petitioners and their counsel abreast of what was happening during this time. *Id.* at 7:22-24. After reaching an impasse with this particular interested party, the Receiver decided that it was “in the receivership’s best interest to remarket the [P]roperty” *Id.* at 7:24-25, 9:1. It was as a result of these remarketing efforts taken by the Receiver and the Brokers that the Property reached the point where it was ready to be sold at auction, having four qualified bidders ready and willing to purchase the Property. *Id.* at 8:3-11.

Therefore, based on the foregoing, the Court finds that the Receiver exercised sound business judgment in recommending to the Court the bid of \$6,550,000 as the highest and best offer for the Property.

With respect to the arguments made by the Petitioners in support of their objection to the Receiver’s recommendation, nothing the Petitioners raise changes the Court’s decision. Turning first to the Petitioners’ “strange times” argument, the Court finds it disingenuous for the Petitioners to suggest that the highest and best offer recommended by the Receiver should be rejected because

a higher offer could, hypothetically, be received at a later time. Not only is this argument purely speculative, ignoring the fact that a lower offer could also be made, but if the Petitioners were truly concerned about selling the Property during these “strange times,” then the Petitioners could have raised this earlier and prevented the Property from going to auction until a later time. Instead, the Petitioners waited until after the auction concluded to raise this concern.

The reality is that the Petitioners have been actively involved in this case since its inception, and now that an offer has been recommended to the Court which the Petitioners believe is too low, the Petitioners are attempting to circumvent the auction by coming in post-auction and offering a higher bid.¹² The Petitioners’ questionable intentions in submitting this post-auction bid is further compounded by the fact that the Petitioners did not object to the \$5,150,000 stalking horse bid, did not submit a competing stalking horse bid, and did not object (or adhere) to the clear bidding procedures set forth by this Court. *See supra* Section (A)(1).

Finally, as for the Petitioners’ “materially adversely affected” argument, the Court, again, emphasizes that the Petitioners did nothing to protect their interest prior to attempting to submit their post-auction bid. Put simply, the Petitioners put themselves in this position. *See Arena v. City of Providence*, 919 A.2d 379, 395 (R.I. 2007) (reaffirming the equitable principle that “[t]he law ministers to the vigilant not to those who sleep on perceptible rights”) (quoting *Puleio v. Vose*, 830 F.2d 1197, 1203 (1st Cir. 1987)). For example, before the Court approved the bidding procedures as mentioned above, the Petitioners could have easily expressed their desire to credit bid and attempted to ensure that the bidding procedures reflected that. Instead, the Petitioners did nothing.

¹² The Court will discuss reopening the auction in light of the Petitioners’ \$9,500,000 offer *infra*.

In short, the Court finds that the Receiver exercised proper business judgment in recommending the \$6,550,000 as the highest and best offer for the Property and nothing argued by the Petitioners warrants a different result. However, because the Petitioners are attempting to submit a post-auction offer that is higher than the offer recommended by the Receiver, the Court will turn now to whether it will reopen the auction to allow the Petitioners to submit their bid.

2

Reopening Bidding

Immediately following conclusion of the auction, the Petitioners asked this Court to allow them to submit an alternative proposal. (Afternoon Session Hr’g Tr. 9:3-4.) The Petitioners’ proposal consisted of, among other things, the Court allowing the Petitioners to take title to the Property with a credit bid of \$9,500,000, with cash to be paid by the Petitioners for all the same closing costs that would have otherwise been paid by the auction’s successful bidder.¹³ *Id.* at 13:17-20. In effect, the Petitioners are asking this Court to reopen the auction and permit the Petitioners to submit a credit bid despite the Court’s denial of its Motion to Authorize Credit Bid and the Petitioners’ failure to adhere to the Court’s bidding procedures, as fully discussed above.

In determining whether to reopen the auction to permit the Petitioners to submit a credit bid that is approximately \$3 million more than the Receiver’s recommended bid, the Court finds the First Circuit’s decision in *In re Gil-Bern Industries, Inc.* particularly instructive. 526 F.2d 627 (1st Cir. 1975). In *Gil-Bern*, the bankruptcy court held a hearing to confirm the sale of property

¹³ The Petitioners also offered to pay the court-approved break-up fee in cash. (Afternoon Session Hr’g Tr. 13:23-25.) Moreover, the Petitioners stated that if the stalking horse bidder wanted to “try to persuade the Court to go back to the original break-up fee of a flat \$100,000, [the Petitioners’ counsel was] authorized by Rialto to say that Rialto will pay the \$100,000.” *Id.* at 14:1-4. The Petitioners also explained that if the Court permitted the Petitioners to submit their proposal, that the broker fee would be “four percent of the \$9.5 million instead of four percent of the [\$]6.55[.]” *Id.* at 13:20-23.

to the highest bidder at an auction that was conducted prior to the confirmation hearing. *Id.* at 628. At this hearing, however, the losing bidder attempted to reopen the bidding to submit a higher offer. *Id.* The bankruptcy court reopened the bidding and three new bids were subsequently made, with the original successful bidder prevailing but at a higher price than their initial bid. *Id.* As a result, the successful bidder appealed the bankruptcy court's decision to reopen the bidding, but the district court affirmed the bankruptcy court's decision. *Id.* The First Circuit, however, disagreed with both the bankruptcy court and district court.

In vacating the bankruptcy court's decision to reopen bidding, the First Circuit explained that "we are in accord with the established rule that it is an abuse of discretion for a bankruptcy court to refuse to confirm an adequate bid received in a properly and fairly conducted sale merely because a slightly higher offer has been received after the bidding is closed." *Id.* at 629 (citing *In re Stanley Engineering Corp.*, 164 F.2d 316, 319-20 (3rd Cir. 1947) (further citations omitted).

The First Circuit went on to explain that

"[i]t might not only be thought improper for a bankruptcy court to proceed in an irregular fashion merely to gain a few extra dollars in one case, but in the long run such a practice would be penny wise and pound foolish. *Creditors in general would suffer if unpredictability discouraged bidders altogether.* At least such practice might encourage low formal bids." *Id.* (citing *In re Stanley Engineering Corp.*, 164 F.2d at 319) (emphasis added).

The facts presented in *Gil-Bern* are similar to the facts in the instant case. In both cases, the auctions were conducted properly and fairly and, following conclusion of the auction, a higher bid was proposed after the bidding had closed. What is different about the instant case, however, is that the Petitioners, unlike the losing bidder in *Gil-Bern*, were not a qualified bidder and did not (and could not) participate in the auction. Put another way, in *Gil-Bern*, the bidder seeking to reopen the bidding with a higher offer was a proper bidder in the auction. *Id.* at 628. Here,

however, the Petitioners were not qualified bidders because, as explained above, they failed to adhere to the bidding procedures set forth by this Court. While the Petitioners could argue that their proposed bid of \$9,500,000 is more than “slightly higher” than the \$6,550,000 offer recommended by the Receiver, the Petitioners, again, were never qualified to bid at the auction. *See Wiesel v. Cicerone*, 106 R.I. 595, 606, 261 A.2d 889, 895 (1970); *In re Bigler, LP*, 443 B.R. 101, 110 (Bankr. S.D. Tex. 2010). Thus, the Petitioners present a weaker case than the losing bidder in *Gil-Bern*, as reopening the bidding to permit an *unqualified bidder* to submit a bid following the close of the auction would surely be an abuse of discretion.

Additionally, this Court is of the opinion that when an auction is conducted in a manner that is beyond reproach and there are bidding procedures that are both clear and simple, the integrity of the judicial system takes precedence over ensuring that more dollars to the receivership estate by allowing a late bid that is a higher offer. *See Wiesel*, 106 R.I. at 606, 261 A.2d at 895 (agreeing with “the maintenance of the integrity of the judicial process at all times”); *In re Bigler, LP*, 443 B.R. at 110 (disagreeing with the Eighth Circuit’s non-binding precedent focusing on what is in the best interest of the estate while not providing sufficient deference to “preserving the integrity of the judicial process” and instead, focusing on preservation of the judicial system despite the existence of a higher bid that comes after the bidding has closed).

The Court set forth clear and simple bidding procedures, which the Petitioners did not object to, and there is no other reason, as a matter of equity, that justifies reopening the auction. *See In re Bigler, LP*, 443 B.R. at 110 (explaining that bankruptcy judges should only consider reopening bidding when there has been an “irregularity in the auction process or some other circumstance relating to the auction process has occurred such that, as a matter of equity, the

auction should be reopened.”). Therefore, the Court refuses to reopen the bidding to allow the Petitioners to submit their credit bid.

IV

Conclusion

Based on the foregoing, the Court confirms its denial of Petitioners’ Motion to Submit Credit Bid and accepts the highest and best offer recommended by the Receiver, and denies the Petitioners’ request to submit a late bid. The Receiver shall prepare the appropriate order for entry.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: Rialto Capital Advisors LLC and RSS UBSCM2012-C1 – RI RD, LLC, et al. v. Robert Day, LLC and real property located at 10 Dorrance Street, Providence, RI

CASE NO: PC-2018-06964

COURT: Providence County Superior Court

DATE DECISION FILED: December 22, 2021

JUSTICE/MAGISTRATE: Stern, J.

ATTORNEYS:

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For Respondent: Joshua A. Berlinsky, Esq.; Hannah Sfameni, Esq.

Receiver: Theodore Orson, Esq.; Giovanni La Terra Bellina, Esq.; Harmony A. Bodertha, Esq.

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